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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This brief is in reply to the opposition briefs filed by the Federal Energy Regulatory Commission (FERC) and the Rock Creek Limited Partnership ("Rock Creek"). The respondents make several arguments similar to those considered and rejected by this Court in *California v. United States*, 438 U.S. 645 (1978), in its construction of section 8 of the Reclamation Act of 1902. Since section 8 was the progenitor of section 27 of the Federal Power Act (FPA), this Court should reject the same arguments in construing section 27.

I

CONTRARY TO THE RESPONDENTS' ARGUMENT, *FIRST IOWA'S* ANALYSIS OF SECTION 27 IS IN CONFLICT WITH THE *CALIFORNIA* DECISION

In the petition, we argued that *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), is in conflict with *California v. United States, supra*. Pet. 7-14. The conflict arises, we argued, because *First Iowa* stated that section 27 of the FPA is limited to "proprietary rights" and does not authorize state regulation of water use, and *California* adopted the opposite view in construing section 8 of the 1902 Reclamation Act, which, as the Ninth Circuit observed below, was the model for section 27. Pet. 7-14; Pet. App. 9, 10. In reply, the respondents argue that *First Iowa* and *California* are not in conflict because the decisions considered two dissimilar federal programs. FERC Br. 15-16; Rock Creek Br. 10-13. According to the respondents' argument, the FPA provides for "comprehensive" federal regulation of hydropower and the Reclamation Act of 1902 merely "provides for federal funding of irrigation projects." Rock Creek Br. 11.[1]

As noted in the petition, the similarities of the FPA and the 1902 Reclamation Act are stronger than their differences because both acts provide for federal *development* of water for specified economic purposes, and both create federal agencies that are responsible for providing such development. Pet. 12-13.[2] Additionally, both acts provide for utilization of a resource—water—that the states have traditionally regulated and controlled. *Id.* Because of these similarities, it is improbable that Congress intended to displace state water law in one context and not the

[1] In fact, the 1902 Reclamation Act provides for federal authorization, construction and operation of reclamation projects, and Congress' amendatory reclamation laws authorize certain projects to be operated for multiple purposes, including hydropower purposes. See, *e.g., California v. United States*, 438 U.S. 645, 651 (1978) (New Melones Project).

[2] The 1902 Reclamation Act created the Bureau of Reclamation, an agency of the Department of the Interior, to administer the federal reclamation program. *California*, 438 U.S. at 676.

other. Moreover, Congress and the Secretary of the Interior have narrowed any differences in the programs by providing for extensive regulation of federal reclamation projects, both through statutory requirements and administrative regulations. Pet. 12-13. Rock Creek's argument that the Reclamation Act "does not impose a broad federal regulatory scheme," Rock Creek Br. 11, is incorrect.

More importantly, the legislative history of the FPA indicates that Congress followed the precedent of section 8 in enacting section 27, see Pet. 16-17, and thus Congress intended that state water laws would apply equally to its reclamation and hydropower programs regardless of any differences in the programs. Indeed, contrary to the respondents' argument that sections 8 and 27 should be read incongruently, the *First Iowa* Court read the provisions congruently by stating that section 27 "carries" the meaning of section 8 "into" the FPA. *First Iowa*, 328 U.S. at 176 n. 20. Therefore, the congressional policy of deference to state water law that informs section 8, *California*, 438 U.S. at 653, equally informs section 8. Because of the progenitive relationship between the provisions, there is no principled way to distinguish between them with respect to their anti-preemptive effect.

II

CONTRARY TO THE RESPONDENTS' ARGUMENT, *FIRST IOWA* DID NOT DEFINITIVELY RESOLVE THE ISSUE PRESENTED HERE

The respondents argue that *First Iowa* definitively construed section 27 and thus resolved the issue here. FERC Br. 12-14; Rock Creek Br. 5-10. The United States made a similar argument in *California*, asserting as its first argument that "[t]his case is controlled by prior decisions of this Court." Brief for United States, *California v. United States*, at 21, No. 77-285, Oct. Term 1977 (hereinafter "U.S. Br. (*California*)"). This Court rejected the United States argument, holding that the Court's prior decisions had not definitively construed section 8 of the 1902 Reclamation Act.

Similarly, *First Iowa* did not definitively resolve the issue here and the decision can be distinguished here. In *First Iowa*, this Court held only that section 9(b) of the FPA does not require a state water right as "a *condition precedent* or an administrative procedure that must be exhausted *before securing a federal license*." 328 U.S. at 170 (emphasis added). Indeed, the petition for writ of certiorari in *First Iowa* framed the issue in terms of whether section 9(b) required a state water right as a "condition precedent" to a FERC license.[3] This case, on the other hand, arises under section 27 rather than section 9(b), for the project has already acquired a FERC license and California does not challenge the issuance of the license. The question here is whether section 27 imposes an *independent* obligation on a hydropower project to comply with state water law irrespective of its rights and obligations under the federal license, and thus whether the project must acquire a state water right prior to actually diverting water. This question was not presented in *First Iowa*, which focused on the meaning of section 9(b) in FERC licensing proceedings.

To be sure, *First Iowa* went beyond its immediate holding to comment on section 27, stating that section 27 is limited to "proprietary rights" and does not authorize state regulation of hydropower water uses. *Id.* at 176. This statement was dictum because it was unnecessary to the Court's holding concerning the limited scope of section 9(b). This dictum is reminiscent of this Court's earlier dicta concerning section 8 of the 1902 Reclamation Act, to the effect that section 8 is limited to "proprietary

[3] The petition for writ of certiorari in *First Iowa* stated at the outset that:

> "The dominant issue underlying the questions presented is whether *Section 9(b) of the Federal Power Act*, is to be so construed that the State of Iowa, and all other states and territories of the United States, may by statute require a state or territorial permit or license for the construction of a power project, upon navigable waters of the United States, as a *condition precedent* to the issuance of a federal license under Part I of the Federal Power Act." Pet. for Writ of Cert., *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, at 8-9, No. 603, Oct. Term, 1945 (emphasis added).

rights" and does not authorize state regulation of federal water uses. *Ivanhoe Irrigation Dist. v. MacCracken*, 357 U.S. 275, 291-292 (1958) (dictum); *City of Fresno v. California*, 372 U.S. 627, 630 (1963) (dictum). In *California v. United States*, 438 U.S. 645, this Court characterized the "proprietary rights" statements in *Ivanhoe* and *City of Fresno* as "dicta," rejecting the dissenting opinion's view that the statements comprised the "holding" of the earlier cases. 438 U.S. at 691 (White, J., dissenting). The *California* majority opinion then specifically "disavow[ed]" the dicta, stating that section 8 "does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.'" 438 U.S. at 672-674, & n. 24. Since *California* rejected the earlier dicta in *Ivanhoe* and *City of Fresno* that section 8 is limited to "proprietary rights," and since section 8 served as the model for section 27, this Court should now reject the *First Iowa* dictum that section 27 is limited to "proprietary rights."

III

ON ITS FACE, SECTION 27 AUTHORIZES RATHER THAN PRECLUDES STATE REGULATION OF HYDROPOWER WATER USES

The respondents argue that their "proprietary rights" argument is supported by the language of section 27, which saves state laws relating to the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1982 ed.). According to their argument, hydropower uses are not encompassed within the category of "irrigation" uses, "municipal" uses, "other uses" or "vested rights." FERC Br. 11, 13-14; Rock Creek Br. 11-12.

In *California*, this Court rejected this same argument in construing section 8 of the 1902 Reclamation Act. Similarly to section 27, section 8 saves state laws relating to the "control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 43 U.S.C. §§ 372, 383. In

California, the United States argued, among other things, that section 8 is limited to "irrigation" uses and that the State Board conditions in that case "have little to do with irrigation." U.S. Br. (*California*) 36. This Court rejected the United States' argument by holding that state water laws apply to *all* water uses of federal reclamation projects, not just irrigation uses. *California*, 438 U.S. at 665, 667. The Court stated that section 8 requires compliance with "the substance, as well as the form, of state water law," and that the United States' argument "would trivialize the broad language and purpose of § 8." *Id.*[4] Since *California* held that section 8 establishes a broad policy of deference to state water law that transcends "irrigation" uses, this Court should construe section 27 of the FPA in the same way. Therefore, the reference to "other uses" in section 27 includes *all* water uses that fall within traditional state jurisdiction, including hydropower uses.

IV

THE RESPONDENTS' ARGUMENT WOULD RESULT IN POTENTIALLY INCONSISTENT REGULATION OF WATER RIGHTS IN THE SAME RIVER

In the petition, we argued that the Ninth Circuit decision would result in potentially inconsistent regulation of water rights in the same river. Pet. 21-23. In reply, FERC asserts that, to the extent that FERC adopts different regulations than the states in a particular river, FERC "is acting in accordance with the power Congress expressly conferred." FERC Br. 19. In effect, FERC concedes that its view results in potentially inconsistent regulation of water rights, and argues that Congress mandated such inconsistency in enacting the FPA. Again, this Court in *California* rejected the same argument in construing section 8, commenting unfavorably that "legal confusion . . . would arise if federal water

[4] On remand, the Ninth Circuit, in a decision authored by then Judge Kennedy, held that section 8 requires the United States to comply with state law with respect to *all* uses—including hydropower uses—of multiple purpose projects, thus again rejecting the United States' argument that section 8 does not apply to non-irrigation uses. *United States v. California*, 694 F.3d 1171 (9th Cir. 1982).

law and state water law reigned side by side in the same locality." 438 U.S. at 668-669.

Indeed, since Congress has traditionally deferred to state water laws, it is highly unlikely that Congress would depart from this traditional policy in establishing a federal regulatory program concerning *private* projects that affect local rather than national interests, where such departure would preclude the states from providing for coordinated management and regulation of all water rights in individual river systems. This Court has noted that water rights are "highly interdependent," and that such interdependency supports the need for "comprehensive state systems for adjudication of water rights." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). Because of such interdependency, it is unlikely that Congress would impair the states' traditional authority to regulate and coordinate water rights without clearly manifesting its intent on the subject. To the contrary, the legislative history of the FPA indicates that Congress intended to require hydropower projects to comply with state water laws to the same extent that others must comply, and indeed to the same extent that, after *California*, the United States itself must comply. Thus, Congress provided for uniform rather than inconsistent regulation of water rights in individual river systems.

V

THERE IS NO CONFLICT BETWEEN STATE AND FEDERAL REGULATION OF THE HYDROPOWER PROJECT IN THIS CASE

In the petition, we argued that there is no conflict between the state and federal regulations in this case because, first, California has granted rather than denied a water right permit for the Rock Creek project, and, second, California's flow requirements are more stringent than FERC's flow requirements, and thus the project—in complying with California's flow requirements—will necessarily comply with FERC's requirements. Pet. 23-24. In reply, FERC argues that California's flow requirements, even though more stringent than the FERC requirements, interfere

with FERC's authority to make "comprehensive planning judgments" and to "balance" competing hydropower and non-hydropower needs. FERC Br. 17-18. In effect, FERC argues that Congress has "occupied the field" of water regulation, thus leaving no room even for state laws that do not "conflict" with federal regulation. The United States made the same argument in *California*, asserting that "[w]hile Congress has provided for extensive federal-state coordination, it has also recognized that someone must have the final administrative authority," and that "Congress has lodged that authority in the Federal Government, and in the Secretary of the Interior in particular." U.S. Br. (*California*) 34. The *California* Court rejected the United States' argument, holding that state water laws apply to federal reclamation projects to the extent that such laws are not inconsistent with congressional directives. 438 U.S. at 662 n. 25.

The respondents' "occupation of the field" argument should be similarly rejected here. The argument is inconsistent with the broad language and purpose of 27, which provides, on its face and in its historical context, that state water laws play a significant role in the federal regulatory process. Under section 27, FERC and the states have *concurrent* jurisdiction over hydropower projects, and FERC's jurisdiction therefore is not exclusive. The FPA's regulatory scheme is similar to that of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, which, as this Court has held, provides that the Army Corps of Engineers and the states exercise *concurrent* jurisdiction over water projects that affect both federal navigation interests and state water rights interests. *Cummings v. Chicago*, 188 U.S. 410, 431 (1903); see Pet. 20.

Finally, FERC's "occupation of the field" argument is inconsistent with FERC's own contemporaneous construction of the FPA. In 1924, FERC's predecessor, the Federal Power Commission (FPC), issued an opinion stating that:

> "The development of water power on the lands of the United States requires the approval of both the State and the Federal Governments, the former granting the right to use the water, the latter the right to use the land. Under the Federal water power act a license may not be issued until an applicant has secured its water rights from the appropriate State authority." FPC, Fourth Annual Report, at 10-11 (1924).

In 1927, the FPC expressly stated that the states have the right to "veto" FPC-licensed projects that are unable or unwilling to comply with state water laws. FPC, Seventh Annual Report, at 3 (1927). In 1931, the FPC stated that:

> "Congress, in this legislation, perhaps more than in any other piece of legislation on similar subjects, has sought to protect and preserve to the States not only the rights, privileges and benefits of the State in the resource itself, but its power, through local governmental action, to regulate and control the resources thus developed to the advantages of its citizens." FPC, Eleventh Annual Report, at 12 (1931).

The FPC's contemporaneous interpretation of the FPA more accurately reflects the congressional intent than FERC's interpretation today.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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